SERVED: August 16, 1994

NTSB Order No. EM-176

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 13th day of August, 1994

J. W. KIME, Commandant, United States Coast Guard, v. MICHAEL J. SWEENEY, Appellant.	Docket ME-155

OPINION AND ORDER

Appellant, by counsel, seeks review of a decision of the Vice Commandant (acting by delegation, Appeal No. 2546, dated June 30, 1992) affirming a decision and order entered by Coast Guard Administrative Law Judge H. J. Gardner on June 21, 1991, following an evidentiary hearing that concluded on March 13, 1991.[1] The law judge had sustained a charge that appellant had

[1]Copies of the decisions of the Vice Commandant and the law judge are attached.

used a dangerous drug (namely, marijuana) and had ordered that appellant's Merchant Mariner's License (No. 645588) and Document (No. Z555 86 4908D2) be suspended outright for six months with six additional months' suspension remitted on twelve months' probation. As we find no reversible error in the Vice Commandant's affirmance of the law judge's decision, we will deny the appeal, to which the Coast Guard has filed a reply in opposition.[2]

Briefly stated, appellant argues on appeal[3] (1) that the Coast Guard did not carry its burden of proof on the charge of wrongful use of a dangerous drug because it did not establish, among other things, the qualifications of various individuals involved in the testing and analysis of the findings of the urine sample on which it is based and (2) that the results of the urinalysis should have been thrown out because chain-of-custody requirements applicable to the collection of the sample were not followed exactly and because the collection site itself did not

[2]This matter was previously before the Board on the appellant's interlocutory appeal from the Vice Commandant's attempt to nullify a temporary license and document he had issued pending his disposition of appellant's appeal from the law judge's June 21, 1991 order. The Board in NTSB Order EM-165 (served May 11, 1992) directed the reinstatement of the temporary authority.

[3]Appellant asks that the Board, in the event it denies this appeal, reflect in its order his asserted entitlement to offset the license suspension upheld in this case by the periods of time during which he has or will have been without a permanent or temporary license while awaiting a final determination. We will deny this request, for we agree with the Coast Guard that it should determine in the first instance the extent to which such periods should be credited.

provide the level of security that certain guidelines contemplate.[4] As we believe that the Vice Commandant's decision and the reply of the Coast Guard persuasively explain why appellant's arguments lack merit, extended discussion of the facts out of which those arguments arise is unnecessary.

With regard to appellant's first contention, it should be noted that no claim is made that either the laboratory personnel who performed the testing of his urine sample or the medical review officer (MRO) who analyzed their findings were not qualified to execute those tasks, and there is absolutely no evidence in the record to suggest that they did not accomplish their duties in accordance with all relevant standards. Rather, appellant maintains that the Coast Guard was obligated to advance evidence on the qualifications of these individuals in order to establish a prima facie case, whether or not any issue as to qualifications has been raised. Like the Coast Guard, we disagree.

The law judge's 70-page decision recounts in painstaking detail the evidence as to the conduct of the collection of appellant's urine sample at Saint Francis Memorial Hospital in San Francisco, the testing to which it was subsequently subjected

[4]Although appellant's brief on appeal to the Board purports to incorporate, at least for some purposes, his brief on appeal to the Vice Commandant, it does not press here all of the objections to the law judge's decision that were previously raised for the Vice Commandant's consideration. Our decision, therefore, will be limited to a review of the objections that the brief to us expressly identifies as having been incorrectly resolved by the Vice Commandant.

at the Nichols Institute laboratory in San Diego, the individuals who participated in the collection and testing processes and a description of what each of them had actually done with respect to appellant's sample, and the chain-of-custody procedures utilized along the way by those institutions and their employees. Assuming, for the purpose of discussion, that a showing on all of these matters was required, notwithstanding the abundant evidence as to the impressive qualifications of the laboratory itself to carry out chemical testing, we see no reason why the Coast Guard, in the absence of any particularized challenge at the hearing level to the qualifications of any of the laboratory personnel or the MRO, also needed to show that each of them was competent to perform the responsibilities they were employed or designated to fulfil.[5] To the contrary, it seems to us that the laboratory report itself, once it was signed by the MRO, constituted proof adequate to shift to appellant the burden of going forward with evidence that the positive finding of marijuana metabolites in his urine was not the product of a wrongful use of the drug.[6]

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[5]It should also be observed that the MRO, Willard P. Johnson, M.D., who verified the positive drug use finding on receipt of the laboratory's report, is affiliated not with Nichols Institute, but with appellant's union, Seafarers' International. Appellant later urged the Coast Guard to accept this same MRO's opinion that he had been cured of his drug use as evidence supporting the issuance of a temporary license.

[6]In fact, appellant tried, unsuccessfully, to do so by testifying that, unbeknownst to him, brownies that he had eaten at a party about a week before the urine sample was given had been laced with marijuana. The law judge did not credit this testimony in light of evidence refuting unknowing ingestion of a

Appellant's second contention fares no better, for it essentially proceeds on the premise that any deviation from the requirements of certain assertedly mandatory drug-testing guidelines adopted by the U.S. Department of Transportation (DOT) invalidates the test.[7] Appellant cites no case law in support of his position, and we are unconvinced that there can be no de minimis or irrelevant breaches of the guidelines or the regulations based on them. Specifically, we find no reversible error either in the law judge's determination that the fact that the appellant did not initial the seal, bearing his typed initials, and admittedly placed in his presence over his specimen bottle, did not vitiate the chain-of-custody,[8] or in his judgment that any inadequacies in the hospital's provisions for ensuring the security of collected samples were not relevant, given the evidence that appellant's sample was given to the courier for the laboratory almost immediately after it had been collected and packaged.[9]

(..continued)
brownie containing the drug.

[7]The U.S. Department of Health and Human Services' *Mandatory Guidelines for Federal Workplace Drug Testing Programs* were adopted by DOT in 1989 and published in 49 CFR Part 40, Procedures for Transportation Workplace Drug Testing Programs.

[8]The requirement that the donor initial the seal is actually not published in either the original guidelines or in the regulations DOT adopted. It appears, rather, in a September 1988, DHHS publication entitled *Urinalysis Collection Handbook for Federal Drug Testing Programs*.

[9]Appellant suggests some impropriety in the law judge's reference to the name of the courier as Colbank Courier Services, when, according to appellant, the hospital witness who identified the courier said it was Med Courier Services. See Transcript,

ACCORDINGLY, IT IS ORDERED THAT:

1. The appellant's appeal is denied,[10] and

2. The Vice Commandant's decision affirming the decision and order of the law judge is affirmed.

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.

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Vol. I, page 99. This circumstance does not indicate that the law judge had gone outside the record. The same witness referred to the courier as Colbank Courier Services earlier in her testimony. Id. at 86.

[10]Contrary to appellant's suggestion that we order oral argument in this matter, we find that the written submissions and the record provide an adequate basis for our review of the issues raised.